(23,271)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1912.**

## No. 696.

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FREDERICK DE BARY & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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INDEX.



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1912.

a Sauer, Transcript, $6.00.

STATE OF LOUISIANA,
*Parish of Orleans, City of New Orleans:*

Civil District Court for the Parish of Orleans.

Civil District Court, Division "B."

No. 95227.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & COMPANY.

*Detailed List of All Docket Entries, in Chronological Order, from Docket Number Three in the Above Numbered and Entitled Cause from the 23rd Day of November, 1910 (the Date of the Filing Rule for License), to the 18th Day of May, 1911 (the Date of the Filing Motion of Appeal), Both Inclusive.*

1910.
November 23. Rule for License.
December 9. Exception & answer.
1911.
April 28. Statement of facts.
May 5. Amended answer.
" 5. Submitted.
" 12. Rule dismissed.
" 18. Judgment signed.
" 18. Motion of appeal.

1 *Rule for State License.*

Filed November 23rd, 1910.

STATE OF LOUISIANA,
*Parish of Orleans, City of New Orleans:*

Civil District Court for the Parish of Orleans.

Civil District Court, Division "B."

No. 95227.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & COMPANY.

On motion of John Fitzpatrick, State Tax Collector for this city, through Edward Rightor, attorney in license matters, and on sug-

gesting to the court that Frederick de Bary & Company, a commercial firm of New York City, is and has been engaged in the business of disposing of alcoholic liquors in less quantities than five gallons, in this city, continuously durng the years 1910, 1909, 1908 and 1907, at No. 1001 S. Front St., without any state license for so doing, and that its gross receipts for each of said years for liquors disposed of in less quantities than five gallons were between five and ten thousand dollars per annum; that it is delinquent therefor; that there is due therefor to the State the sum of two hundred dollars for each of the years 1907, 1908, 1909 and 1910, with two per cent per month interest from March 1st, 1907 on two hundred dollars; two per cent per month interest from March 1st, 1908 on two hundred dollars; two per cent per month interest from March 1st, 1909 on two hundred dollars; and two per cent per month interest from March 1, 1910 on two hundred dollars; and ten per cent attorney's fees on the whole.

It is ordered that it show cause, through its proper officer, on Friday —— — 1910 at 11:00 A. M. why it should not pay Eight hundred dollars to the State for said licenses for said years, with two per cent per month interest from March 1st, 1907 on two hundred dollars; two per cent per month interest from March 1st, 1908 on two hundred dollars; two per cent per month interest from March 1st, 1909 on two hundred dollars; and two per cent per month interest from March 1st, 1910 on two hundred dollars, and ten per cent attorney fees on the whole and costs, and be enjoined from conducting said business until said amounts are paid, with privilege upon all its property, movable and immovable.

*Affidavit.*

Before me, Notary Public, for the Parish of Orleans, came Edward Rightor, who being sworn, said that he is the duly appointed and qualified attorney for delinquent licenses for the State Tax Collector for this city and that he has good reason to believe that the allegations of the above rule are true.

(Signed) EDW. RIGHTOR.

Sworn to and subscribed before me this 23 day of November, 1910.

(Signed) A. W. COOPER,
[SEAL.] *Not. Pub.*

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*Exception & Answer.*

Filed December 9th, 1910.

Civil District Court, Division "B."

No. 95227.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & Co.

And now come the defendants Frederick de Bary & Co., and except to the maintenance of said rule because no cause of action is set up or averred therein, wherefore said rule should be dismissed.

And in case said exception be overruled, said defendants make answer to said rule as follows, viz:—

1st. They deny all and singular the allegations of said rule, excepting such as may be hereinafter specially admitted.

2. They admit and aver that they are engaged in business in the City of New York as importers of wines and liquors for sale and that they have made some sales of champagne and liquors in New Orleans during the years 1909 and 1910, the amount of such sales not exceeding $3,000 in each of said years.

3rd. And further answering they aver that all wines and liquors sold by them were of foreign production and were by them imported from foreign countries into the United States, under the laws thereof; that they were all subject to duty under said laws upon their importation, that they paid such duties and thereby acquired the right to sell the goods imported, which right to sell could not be taxed by the State of Louisiana in the form of a license
4 or otherwise, or in any way impaired; that all such goods were sold in the original packages in which imported, and they are in no way liable to the taxes sought to be recovered in this case.

Wherefore they pray that said rule be dismissed at mover's cost. And they pray for general relief.

(Signed) ROUSE, GRANT & GRANT,
*Attorneys for Defendants.*

*Statement of Facts.*

Filed April 28th, 1911.

Civil District Court for the Parish of Orleans, Division B.

No. 95227.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & Co.

The following is a statement of the facts in this case, agreed upon by the respective parties, Viz:—

1. Frederick de Bary & Co., the defendants, are and were engaged during all the time embraced in the plaintiff's rule in business in the City of New York as importers of wines and liquors for sale; that all wines and liquors sold by them during that time in New York, in New Orleans, or elsewhere, were of foreign production, and were by them imported from foreign countries, into the United States under the laws thereof; and that upon their importation they were all subject to duties under said laws which were duly paid by them.

5 2. That they paid the special taxes imposed upon wholesale and retail dealers, by the laws of the United States, in New Orleans, for the license years 1909 & 1910.

3. That a case of wine of their importation contains about three gallons.

4. That the wines and liquors which they caused to be sent to New Orleans, La., were mostly imported directly from the countries of their production into the United States at that city, and were there stored in the Standard Warehouse; and that such of these wines and liquors as were not imported directly into the port of New Orleans, were imported into the port of New York, warehoused there, and thence sent to New Orleans, and stored in the same warehouse, from which they were delivered when sold: that their sales were made in quantities of several cases but deliveries of single cases were some times made, and that all such importations were subject to taxes imposed by the laws of the United States, which they paid.

5. That all sales of such wines and liquors made by them during said years, or before, or since, were made in the original unbroken packages thereof in which they were imported.

6. That they were not at any time during the years 1907, 1908. 1909, *or* 1910, engaged in the business of conducting in the State of Louisiana, a bar room, cabaret, coffee house café, beer saloon, liquor exchange, drinking saloon, grog shop, beer house, beer garden, or other place where spirituous, vinous or malt liquors, or intoxicating beverages, bitters or medicinal preparations of any kind, were sold, directly or indirectly, excepting sales of wines and

6 liquors in unbroken packages as above stated in paragraph No. 4.

7. That they did not pay any license tax to the State of Louisiana for said years, or any of them.

8. That their gross annual receipts from sales in the State of Louisiana during the years 1909 and 1910 did not exceed $3,000, in either of said years, and that they made no sales in said State in the years 1907 and 1908.

(Signed) EDW. RIGHTOR,
*Att'y Tax Collector.*

(Signed) ROUSE, GRANT & GRANT,
*Att'ys for Fred'k de Bary & Company.*

*Amended Answer.*

Filed May 5th, 1911.

Civil District Court, Division "B."

No. 95227.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & CO.

And now comes Frederick de Bary & Co., defendants, and without waiving their exception, or any of the averments of their answer herein filed, but affirming the same, now, with leave of the
7 Court, amend their said answer by averring in addition thereto as follows, to-wit:

That the imposition of a license, or any tax by the State of Louisiana upon the sale of their importations of wines and liquors, would be in violation of the Constitution of the United States, Article 1, Section 10, which declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and that the taxes sued for, are sought to be imposed under the laws of the State of Louisiana upon these defendants upon the sale of their imported wines and liquors contrary to the prohibition of said provisions of the Constitution of the United States.

Wherefore, defendants pray that said rule be dismissed at plaintiff's costs. And they pray for general relief.

(Signed) ROUSE, GRANT & GRANT,
*Attorneys for Def'ts.*

*Rule Dismissed (Judgment).*

Civil District Court, Div. "B."

No. 95227.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

*Judgment.*

The rule heretofore submitted to the Court, the Court considering the law and the evidence, for the reasons this day orally assigned.

It is ordered by the Court that the rule herein filed No-
8 vember 23rd, 1910 be dismissed at the costs of plaintiff in rule.

Judgment read and rendered in open Court, May 12th, 1911.

Judgment read and signed in open Court, May 18th., 1911.

(Signed) FRED D. KING, *Judge.*

*Motion of Appeal.*

Filed May 18th, 1911.

Civil District Court, Division "B."

No. 95227.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & Co.

On motion of Edward Rightor, attorney for the State herein, and on suggesting to the court that mover is aggrieved by the judgment, herein rendered on the 12th day of May, 1911, and signed on the 18 day of May, 1911, in favor of Frederick de Bary & Company and against the State of Louisiana; that said judgment is contrary to the law and the evidence and that mover desires to appeal suspensively therefrom to the Supreme Court of the State of Louisiana:

It is ordered by the Court that a suspensive appeal be herein granted to the State of Louisiana, returnable to the Supreme Court of the State of Louisiana on the 12th day of June, 1911.

(Signed) FRED D. KING, *Judge.*

9 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, L. W. Gunther, Deputy Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing Seven (7) pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced, upon the trial of the cause wherein State of Louisiana is plaintiff, and Frederick De Bary & Company is defendant, instituted in this Court and now in the records thereof under the No. 95227 of the Docket thereof, Division "B", the Honorable Fred D. King, Judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said Court, at the City of New Orleans, on this 7th day of June, in the year of our Lord, one thousand, nine hundred and eleven, and in the one hundred and thirty-fifth year of the Independence of the United States of America.

[SEAL.] (Signed) L. W. GUNTHER,
*Deputy Clerk.*

10 *Proceedings Had in the Supreme Court of the State of Louisiana.*

Filing Transcript of Appeal.

No. 18932.

STATE OF LOUISIANA
vs.
FREDERICK DE BARY & COMPANY.

Appeal from the Civil District Court, Parish of Orleans, No. 95227, Division "B" Fred D. King, Judge.
Filed June 10, 1911.
(Signed) JL E. MORTIMER, *Clerk.*

*Continued with Preference* (*Extract from Minutes*).

NEW ORLEANS, *Tuesday, February 27th*, 1912.

The Court was duly opened, pursuant to adjournment.
Present their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.
Absent: Walter B. Sommerville, Associate Justice.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

This case was ordered by the court to be continued with preference.

*Motion to Advance.*

Supreme Court of Louisiana.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY COMPANY.

11 On motion of Edward Rightor Att'y, for mover and suggesting to the court that this is a State case and entitled to a preference.
It is ordered that the same be advence- accordingly.

*Order to Advance (Extract from Minutes).*

NEW ORLEANS, *Monday, March 4th,* 1912.

At Chambers.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

The motion of Edward Rightor, Attorney for the State, having been favorably considered: It is ordered by the Court that this cause be advanced.

*Called and Appearance Argued and Submitted (Extract from Minutes).*

NEW ORLEANS, *Tuesday, March 26th,* 1912.

The Court was duly opened, pursuant to adjournment.
Present their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, and Walter B. Sommerville, Associate Justices.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

This cause came on this day to be heard and was argued by counsel: Mr. Edward Rightor opened for the plaintiff, appellant, Mr. J. D. Rouse replied for the defendant, appellee, and Mr.
12 Rightor closed the argument. The court then took the cause under advisement upon the papers on file.

*Final Judgment (Extract from Minutes).*

NEW ORLEANS, *Monday, May 20th*, 1912.

The Court was duly opened, pursuant to adjournment.
Present their Honors: Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.
Absent: Joseph A. Breaux, Chief Justice.

His Honor, Mr. Justice PROVOSTY, pronounced the opinion and judgment of the Court in the following Case:

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

It is therefore, ordered, adjudged and decreed that the judgment appealed from be set aside and that the rule herein be made absolute, and that the defendant Frederick De Bary and Company be condemned to pay the state of Louisiana two hundred dollars for a state license for the year 1909, with two per cent per month thereon from the 1st day of March 1909; and two hundred dollars for a state license for the year 1910, with two per cent per month interest thereon from the 1st day of March 1910; plus ten cent as attorneys' fees on the whole of the present judgment, and that the defendant pay all costs.

13 *Opinion of the Court.*

UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

NEW ORLEANS, *Monday, May 20th*, 1912.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors:

Joseph A. Breaux, Chief Justice;
Frank A. Monroe,
Olivier O. Provosty,
Alfred D. Land,
Walter B. Sommerville,
Associate Justices.

His Honor, Mr. Justice PROVOSTY, pronounced the opinion and judgment of the Court in the following Case:

14 Mr. Justice Provosty.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

Appeal from the Civil District Court, Division "B" for the Parish of Orleans. Fred D. King, Judge.

MONDAY, *May* 20, 1912.

The present proceeding is a rule taken by the State Tax Collector against the defendant company for the recovery of license taxes claimed to be due the State by the defendant company for the years 1907, 1908, 1909 and 1910 because, it is alleged, "said firm is and has been engaged in the business of disposing of alcoholic liquors in less quantities than five gallons continously during said years at No. 1001 S. Front St., in this city, without having paid any State license for so doing", its gross receipts in said business from sales in less quantities than five gallons amounting to between five and ten thousand dollars per annum.

This license is thus claimed for the years 1907 and 1908 under the Revenue Law of 1898, and for the years 1909 and 1910 under Act 176, p. 236, of 1908, popularly known as the Gay-Shattuck Act.

There is no dispute as to the facts. The defendant company sells foreign wines and liquors from a warehouse in New Orleans in the unbroken package. The package contains three gallons. No sale

has been of less than several of these packages; but deliveries of a single package have been made. Some of the goods are imported direct to New Orleans; others go to New York, and are
15 there stored in the Standard Warehouse, and thence transmitted to New Orleans. Whether the goods thus transmitted are originally destined to New Orleans and stop in New York merely in transitu, or are taken for transmission indiscriminately from the stock of goods in the New York warehouse, and how long they remain in New York, or for what reason they go first to New York and not directly to New Orleans,—is not shown by the record. All the goods have paid impost duties. The defendant company carried on this business in 1909 and 1910, but not in 1907 and 1908. Its gross annual receipts from said business did not exceed $3,000 per annum. It has paid internal revenue licenses for those years both as a wholesale and retail dealer, but has paid no license to the State.

Defendant contends that said statute, Act 176 of 1908, has no application to a business such as that which defendant carries on; but only to the business of conducting a barroom or other like place.

This question was fully considered, and determined adversely to defendant's present contention, in State vs. Pabst Brewing Co., 127 La. 770, where it was held that a Milwaukee brewery which sent its beer to New Orleans and there sold it from a warehouse in the unbroken package was amenable to the provisions of said Act.

Another reason assigned by defendant why said license is not due is that the sales made in said business have been in greater quantities than five gallons, though some of the deliveries under the sales have been in less quantities.

This contention is but lightly touched upon in the brief,
16 evidently because defendant can have but little faith in it. It is manifestly without merit. When said statute speaks of a place where liquors are sold in quantities of less than five gallons it evidently does not mean the place where the contract of sale is entered into but where the delivery is made. Such a law as this concerns itself little with the contract, apart from the delivery: it is the delivery that is the thing. It is it that must be in less quantity than five gallons.

Another contention is that said statute, if applicable to defendant's business, is null, as interfering with interstate commerce.

That point, too, was disposed of in said case of State vs. Pabst Brewing Company.

But defendant contends that said decision, even if correct, cannot control the present case for the reason that it is based on the Wilson Act, (Act of Congress, Aug. 8, 1890), and that said act has reference only to liquors "transported" into a state; and not to liquors "imported" into a state, and that all the liquors sold by defendant were imported. In support of that contention defendant argues that the word "imported" has a well defined legal meaning, and is "the act of bringing goods and merchandise into the United States from a foreign country"; (Bouvier Law Dict., Rawle's Ed., Verbis Imported, Importation); and that this meaning is not conveyed by the

word "transported," made use of in the Wilson Act; that Congress well knew the difference in meaning between the two words, and used the word "transported" advisedly, and would never have consented to allow the States to tax imports of liquors, enabling them by heavy taxes to shut out imports, and thereby deprive the government of an important source of revenue; and that the Supreme Court of the United States, in the case of Delamater vs. South Dakota, 205 U. S. 93-98, recognized this distinction when it said that "The Wilson Act adopted a special rule enabling the states to extend their authority to such liquors shipped from other states."

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There is absolutely nothing *the* show that the court meant here to intimate that liquors brought from a foreign country would not come under the Wilson Act.

As to what Congress would have consented, or not consented, to do, none can say; and, if we come to conjecturing, it is hardly to be supposed that Congress would adopt such a half way, futile and useless measure as to allow the states to protect themselves against liquors coming from other states while denying them the same right as to liquors coming from foreign countries. Would, for instance, allow protection to Texas against liquors coming from Louisiana and Oklahoma, but none against liquors from Mexico. Congress is not addicted to making Dead Sea apple gifts, or to discriminating thus rankly against native producers of any article of commerce, in favor of foreign producers.

Moreover, the Wilson Act uses also the term "introduced therein"; and, most unquestionably, the goods in question were "introduced" into this state.

Clearly, this argument sought to be based upon the difference in meaning between the words imported and transported is without merit.

Defendant contends that the Wilson Act, if construed to authorize the states to impose taxes upon imports, becomes obnoxious to Art. I Sect. 10 of the Constitution of the United States,—that "No state shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

18

Suffice it to say, in answer to this, that this constitutional provision has reference only to such state taxes as may be attempted to be laid upon imports without the consent of Congress; and has no reference to state taxes laid with the consent of Congress.

However, if the interpretation of the Wilson Act contended for by defendant were accepted, the license in question would still be due; since a part of the goods sold by defendant were not imported direct, but were transmitted to Louisiana from the stock of goods stored in the warehouse in New York, and forming part of the general mass of property in the state of New York. Nothing in the record shows that these goods were warehoused in New York while in transit, and not after they had terminated their importation voyage. In other words, that they were shipped direct to New Orleans, via New York, and not simply to New York. No reason is assigned and no suggestion made why these goods should have been stopped and ware-

housed in New York if originally destined to New Orleans. So far as the evidence shows, therefore, the goods were merely "transported" from New York to this state. But even where goods are intended for transmission and are stored merely temporarily, they become a part of the general mass of property of the state, where stored, Brown vs. Houston, 114 U. S. 622; Merchants' Transfer Co. vs. Board of Review, 2 L. R. A. N. S. 662, and cases cited in note; also Leigh Coal Co. vs. Borrough, 15 L. R. A. 514. So that even if said goods were originally intended for New Orleans and were stored in New York, only temporarily, their transmission to New Orleans was a transportation and not an importation into Louisiana, according to the meaning attributed to these two words by defendant.

19 It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside and that the rule herein be made absolute, and that the defendant Frederick de Bary and Company be condemned to pay the state of Louisiana two hundred dollars for a state license for the year 1909, with two per cent per month thereon from the 1st day of March 1909; and two hundred dollars for a state license for the year 1910, with two per cent per month interest thereon from the 1st day of March 1910; plus ten per cent as attorneys' fees on the whole of the present judgment, and that the defendant pay all costs.

[Endorsed:] 18932. State v. De Bary.

20 *Petition for Rehearing.*

Supreme Court of Louisiana.

No. 18932.

STATE OF LOUISIANA
versus
FREDERICK DE BARY AND COMPANY.

Petition for Rehearing on Behalf of Frederick de Bary and Company, Defendants and Appellees.

To the Honorable the Supreme Court of the State of Louisiana:

Your petitioners, Frederick De Bary and Company, defendants and appellees herein, respectfully apply for a rehearing upon the judgment rendered by this Honorable Court on May 20th, 1912 for the following reasons:

We submit that Act 176 of 1908 clearly has no application to the instant case. Such statute was enacted to cover the business of retailing liquor where the liquor was intended to be consumed on the premises. There is no proof in the record to show that such was the fact, so that the State's contention must fall on this point. If it is the delivery that is the thing, then the circumstances and character of the delivery must be taken into consideration.

There is nothing in the Act of Congress of August 8, 1890 known as the Wilson Act which grants to the States the right to levy a tax on either interstate commerce or imports. Under the 10th Amendment to the Constitution, the grant of such authority must be direct and explicit.

The Wilson Act shows plainly on its face that it was intended to cover the sale of liquor already transported into the State and held out for sale therein. In other words, it related to liquor,
21 the sale and delivery, of which took place within the State. In the instant case, the sale of the liquor took place in New York, although the delivery was made from a warehouse in New Orleans. Congress recognized the distinction in the Act itself, by putting liquor transported into the State for sale therein in the same class as liquor produced within the State, showing that there was no intent to grant an authority to levy a tax on interstate commerce or imports.

In the instant case, De Barry and Company are the importers of the champagne, and it never leaves their custody or control. If the contention of the State were correct, the introduction of this champagne still in the hands of the original importer could be prohibited altogether. No discrimination is possible in favor of imported liquor as against liquor made in other States as seems to be apprehended, and none was intended. As a matter of fact, it is impossible under the Wilson Act, or any other statute federal or local, for the State to prohibit the admission of liquor bought in another State and sent here.

It is the Constitution of the United States and not the Wilson Act which protects imports. There seems to be a confusion of the right to exercise police power with the power to levy a tax. The license sought to be collected is undoubtedly a tax on an imported article still in the hands of the original importer. Congress delegated no authority to levy such a tax. If the Wilson Act delegated any such right as is contended, it would be within the power of the State to prohibit imported articles altogether from being sold within the State and thus impair the revenues of the Federal Government. The fact that some of the goods were temporarily stopped in New York does not deprive them of their character as imports. They still remained in the hands of the original importers and retained their identity as imports no matter where delivery was made.
22 For the above reasons and for the reasons heretofore urged in our original briefs, we respectfully submit that a rehearing should be granted and the previous decree of the Honorable Court reversed and the judgment of the lower court sustained.

Respectfully submitted,

(Signed) J. D. ROUSE,
(Signed) WILLIAM GRANT.
(Signed) WM. B. GRANT.

(Endorsed:) Supreme Court of Louisiana. No. 18,932. State of Louisiana versus Frederick De Bary and Company. Petition for Rehearing on Behalf of Frederick De Bary and Company, Defendants and Appellees. Filed May 25th, 1912. (Signed) John A. Klotz, Dep. Clerk.

*Rehearing Refused.*

(Extract from Minutes.)

NEW ORLEANS, WEDNESDAY, *June 19th*, 1912.

The Court was duly opened pursuant to adjournment.
Present: Their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Alfred D. Land, and Walter B. Sommerville, Associate Justices. Absent: Olivier O. Provosty, Associate Justice.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

"By the COURT:"
It is ordered that the rehearing applied for in this case be Refused.

23 UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing twenty-two (22) pages contain a full, true and complete copy of the proceedings had in the Civil District Court, for the Parish of Orleans, in a certain suit wherein State of Louisiana, was plaintiff, and Frederick De Bary & Company, was defendant; and, also, of all the proceedings had in this Supreme Court on the appeal taken by said Plaintiff, which appeal is now on the files thereof, under No. 18,932.
In Testimony Whereof I have hereunto set my hand, and affixed the seal of said Court, at the city of New Orleans, this the 26th day of June, Anno Domini, one thousand, nine hundred and twelve, and of the Independence of the United States of America, the one hundred and thirty-sixth.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
*Clerk of the Supreme Court of the State of Louisiana.*

24 UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is

Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In Testimony Whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 26th day of June, A. D. one thousand, nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
*Chief Justice of the Supreme Court of Louisiana.*

25 UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana hereby certify that the Supreme Court of the State of Louisiana is the highest Court of law in Louisiana, and that the Honorable Joseph A. Breaux is the Chief Justice of said Court, and that his signature to the above certificate is genuine.

In witness whereof I hereunto set my hand and the seal of the Court aforesaid, at the city of New Orleans, this the 26th day of June, A. D. one thousand, nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
*Clerk of the Supreme Court of the State of Louisiana.*

26 *Petition & Order.*

Supreme Court of Louisiana.

No. 18932.

STATE OF LOUISIANA
VS.
FREDERICK DE BARY & COMPANY.

To the Honorable Joseph A. Breaux, Chief Justice of the Supreme Court of Louisiana:

The petition of Frederick de Bary & Company, defendant in the above cause respectfully shows that on the 20th day of May A. D. 1912, the Supreme Court of the State of Louisiana rendered a final judgment against them herein for the sum of Four Hundred Dollars with interest thereon and costs and awarded execution thereon, as will appear by reference to the record and proceeding in the cause, and that said Court is the highest Court of said State in which a decision in said suit could be had.

Your petitioners claim the right to remove said judgment to the Supreme Court of the United States under Section 709 of the United States Revised Statutes, because petitioners claimed before the Supreme Court of Louisiana exemption from payment of a license tax exacted from them by the State of Louisiana for the privilege of importing wines and liquors of foreign manufacture into the United States, and selling the same in the original and unbroken packages in which they were imported, in the City of New Orleans, under Article 1 Section 10 of the Constitution of the United States, which exemption the Supreme Court of Louisiana denied.

And because the defendant further claimed before the court that the Act of Congress approved August 8, 1890, known as the Wilson Law, does not constitute an assent by Congress to the levy and assessment by the State of the License Tax for which the said judgment was rendered, which claim was denied by the State Supreme Court. All of which more fully appears from the record of the proceedings in the cause which is herewith submitted, and from the assignment of errors filed with this petition.

27 Wherefore, petitioners pray the allowance of a Writ of Error returnable into the Supreme Court of the United States, and for citation and supersedeas, and petitioners will ever pray &c.

JOHN D. ROUSE,
WM. GRANT,
WM. B. GRANT,
*Attorneys for Petitioner.*

27½ [Endorsed:] No. 18932. Supreme Court of Louisiana, State of Louisiana vs. Frederick de Bary & Company, Petition for writ of Error, with supersedeas. Filed June 20th, 1912. Paul E. Mortimer, Clerk. Rouse, Grant & Grant, attorneys.

28 *Assignment of Errors.*

Supreme Court of Louisiana.

No. 18932.

STATE OF LOUISIANA, Appellant,
vs.
FREDERICK DE BARY & COMPANY, Appellees.

Come now Frederick de Bary & Company, defendants and appellees in the above entitled cause, plaintiffs in error, and for the purpose of obtaining a review and reversal of the final judgment rendered against them by the Supreme Court of Louisiana and in favor of Appellant in said cause, and assigns the following errors committed to their prejudice by said Court in said final judgment, to-wit:

1. It appears from the agreed statement of facts upon which the final judgment in said cause was rendered that during all the time mentioned in the rule taken by the State of Louisiana against plaintiffs in error for the recovery of the License Taxes sued for, plaintiffs

in error were engaged in the City of New York in the business of importing into the United States for sale, wines and liquors of foreign production subject to custom import duties which were paid; that a part of such wines and liquors were imported into the port of New York where the same were stored by them in warehouse until sold, but that some were imported at the port of New Orleans and there stored by them in the Standard Warehouse, and some of those imported at New York were sent from there by them and stored in the same warehouse; that all the said wines and liquors imported directly at New Orleans, or brought from New York, were stored by the importers in said Warehouse in the original unbroken packages in which they were imported, and were sold and delivered by them or by their order to the purchasers in Louisiana in like unbroken packages; that each of said packages contained about three (3) gallons; that each sale was for two or more packages, but that deliveries were sometimes made of a single package; that plaintiffs in error were never at any time engaged in the business of conducting in the State of Louisiana a bar-room, cabaret, coffee-
29 house, beer saloon, liquor exchange, drinking house, grog shop, beer house, beer garden, or other place where spirituous, vinous, malt liquor or intoxicating beverages, bitters, or medicinal preparations of any kind were sold directly or indirectly, excepting the wines and liquors imported by them and sold as aforesaid in the original and unbroken packages in which they were imported.

Under this state of facts the Supreme Court of Louisiana erred in holding and deciding that the Act of Congress of August 8, 1890, 26 Statutes p. 313, commonly known as the Wilson Law, was and is a consent by Congress to the levy of a license tax by the State on the importers for the privilege of selling their imported wines and liquors in the State of Louisiana, within the intent and meaning of Article 1, Section 10 of the Constitution of the United States, which justified the denial by the Court of the exemption under said Article pleaded by plaintiffs in error as a defense, and in rendering the final judgment against plaintiffs in error for the amount of said license.

2. The Court erred in denying the right claimed by plaintiffs in error to sell the wines and liquors imported by them from foreign countries without payment of the license taxes sought to be imposed upon such sales by the law of the State of Louisiana in violation of Article 1, Section 10 of the Constitution of the United States.

3. The Court erred in holding and decreeing the liability of plaintiffs in error to a tax upon their sales because some of their wines and liquors were imported into the State of New York and thence sent to New Orleans for sale in their original and unbroken packages by plaintiffs in error, as if the right of sale free from State taxation, depended upon the place of sale instead of the fact of their importation.

4. The Court erred in holding and decreeing that the Act of Congress approved August 8, 1890 known as the Wilson Act, gave the State the right to impose upon plaintiffs in error the taxes herein sued for.

30 5. The Court erred in holding and decreeing that plaintiffs in error had made any sales of wines or liquors in quanti-

ties less than five gallons as untruly alleged in the rule of the State herein, the truth, and the facts agreed upon being that all sales made by plaintiffs in error were made in original packages as imported; that a case of wine of their importation contained about three gallons; and that their sales were made in quantities of several cases, although single cases were sometimes delivered.

6. The Court erred in holding and decreeing that plaintiffs in error were in 1909 and 1910 engaged in the business of conducting in the State of Louisiana a bar-room or like place where spirituous, vinous, or other liquors were sold, within the meaning of the Statute of Louisiana Act No. 176 of 1908.

7. The Court erred in not holding that importers have the right to sell the goods imported by them in the original and unbroken packages in which same were imported, in any market of the United States and are entitled to the same protection granted by Article 1 Section 10 of the Constitution of the United States as to sales made at the original port of entry.

8. The Court erred in holding that the license tax claimed by the State of Louisiana under Act 176 of the Legislature of Louisiana approved July 3, 1908 was levied pursuant to the police powers of the State and that Congress had assented thereto by the Wilson Law of August 8, 1890.

Wherefore, Frederick de Bary & Company defendants and appellees, plaintiffs in error, pray that these assignments of error be maintained and that the final judgment herein complained of may be reversed, set aside, and anulled, with costs.

JOHN D. ROUSE,
WILLIAM GRANT,
WM. B. GRANT,
*Attorneys for Plaintiffs in Error.*

31 Supreme Court of the State of Louisiana.

No. 18392.

STATE OF LOUISIANA, Plaintiff,
vs.
FREDERICK DE BARY & COMPANY, Defendants.

This 20th day of June, 1912, come Frederick de Bary & Company, defendants, by their attorneys and filed herein and present to the Court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the final judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are requisite and proper in the premises.

On consideration whereof the Court does allow the writ of error as prayed upon the defendants giving bond with good and solvent

surety conditioned as the law directs, in the sum of one thousand five hundred dollars, which shall operate as a supersedeas bond.

New Orleans, La., June 20th, 1912.

JOS. A. BREAUX,
*Chief Justice of Supreme Court of Louisiana.*

31½ [Endorsed:] No. 18932. Supreme Court of Louisiana. State of Louisiana, Appellant, vs. Frederick de Bary & Company. Assignment of Errors. Filed June 20, 1912. Paul E. Mortimer, Clerk. John Rouse, Wm. Grant, Wm. B. Grant, Attorneys for Plaintiffs in Error.

32 *Bond.*

UNITED STATES OF AMERICA:

Know all men by these presents, that we Frederick de Bary & Company as principal and National Surety Company as surety, are held and firmly bound unto the State of Louisiana in the full sum of One Thousand Five Hundred Dollars ($1,500), to be paid to the said State of Louisiana its certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of June, in the year of our Lord One Thousand Nine Hundred and twelve.

Whereas, lately at the Supreme Court of the State of Louisiana in a suit pending in said Court between the State of Louisiana, plaintiff, and Frederick de Bary & Company, defendants, No. 18,932, of the docket judgment was rendered against the said Frederick de Bary & Company on the 20th day of May 1912, in favor of said State, and the said Frederick de Bary & Company having obtained a Writ of Error out of the Supreme Court of the United States and filed a copy thereof in the Clerk's Office of the said Supreme Court of the State to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Louisiana citing and admonishing it to be and appear within thirty day- at a session of the Supreme Court of the United States to be holden at the City of Washington.

Now the condition of the above obligation is such that if the said Frederick de Bary & Company shall prosecute said writ of
33 error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) FREDERICK DE BARY & COMPANY, [SEAL.]
(Signed) By WM. GRANT, [SEAL.]
*Their Attorney.*
(Signed) NATIONAL SURETY COMPANY,
(Signed) By WM. A. TOURTAREL,
*Res. Vice-President.*
(Signed) J. V. KEATING, [SEAL.]
*Res. Ass't Secretary.*

Signed and delivered in presence of
(Signed) FRANK FARRELL.
(Signed) WM. B. GRANT.

Approved:
(Signed) JOS. A. BREAUX,
*Chief Justice Supreme Court of Louisiana.*

June 20, 1912.

(Endorsed:) No. 18,932. Supreme Court of Louisiana. Frederick de Bary & Co., Plaintiffs in Error, vs. State of Louisiana, Defendant in Error. Bond. Filed June 20, 1912. (Signed) Paul E. Mortimer, Clerk.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Louisiana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Louisiana plaintiff and Frederick de Bary & Company defendants Number 18,932 of the docket, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or where[illegible] was drawn in question the con-
35 struction of *the* clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant Frederick de Bary & Company as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 20 day of June, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
*Clerk of the District Court of the United States for the Eastern District of Louisiana.*

Allowed by
JOS. A. BREAUX,
*Chief Justice of the Supreme Court of Louisiana.*

June 20, 1912.

[Endorsed:] No. 18932. Frederick de Bary & Co., Plaintiff-in-Error, versus State of Louisiana, Defendant-in-Error. Writ of Error. Filed June 20, 1912. Paul E. Mortimer, Clerk.

36 *Certificate of Lodgment.*

UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana do hereby certify that there was lodged with me, as such Clerk, on June 20th, 1912, in the matter of Frederick de Bary & Company, plaintiff in error, vs. State of Louisiana, defendant in error:

First. The petition for a writ of error and assignment of errors.
Second. The original bond, a copy of which is herein set forth.
Third. Three copies of the writ of error, as herein set forth,—one for the defendant; one to file in my office, and one original incorporated in this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in New Orleans, Louisiana, this 26th day of June, A. D. 1912.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER, *Clerk.*

37 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ

of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, wherein Frederick de Bary & Company are plaintiffs in error and the State of Louisiana is defendant in error to show cause, if any there be, why the judgment rendered against the said Frederick de Bary & Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 20th day of June in the year of our Lord one thousand nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
*Chief Justice of the Supreme Court of the State of Louisiana.*

37½ [Endorsed:] Supreme Court of the State of Louisiana. No. 18932. Frederick de Bary & Co. vs. State of Louisiana. Citation. *Sheriff's Return.* Filed June 22, 1912. Paul E. Mortimer, Clerk Sup. Ct.

NEW ORLEANS, *June 21st*, 1912.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

EDW. RIGHTOR,
*Attorney for the State of Louisiana.*

38 *Return to Writ.*

UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of the State of Louisiana, at the City of New Orleans, Louisiana, this June 26th., 1912.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
*Clerk Supreme Court of Louisiana.*

Endorsed on cover: File No. 23271. Louisiana Supreme Court. Term No. 696. Frederick de Bary & Company, plaintiffs in error, vs. The State of Louisiana. Filed July 2, 1912. File No. 23271.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM 1912

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## No. 696

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FREDERICK DeBARY CO.,
Plaintiffs in Error,

VERSUS

THE STATE OF LOUISIANA,
Defendant in Error.

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ON ERROR TO THE SUPREME COURT OF LOUISIANA

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BRIEF FOR THE PLAINTIFFS IN ERROR

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### STATEMENT OF THE CASE.

The plaintiffs in error were importers at New York and New Orleans, of champagne and other wines and liquors, the produce of foreign countries, all subject, upon their importation, to duties imposed by the laws of the United States, which were duly paid.

This case arose in the Civil District Court for the Parish of Orleans, in the State of Louisiana, where, at the instance of the State Tax Collector, a proceeding by rule was instituted against the plaintiffs in error for the recovery of license taxes alleged to be due to the State for certain years, because, it was alleged, the plaintiffs in error had been continuously during said years "engaged in the business of *disposing of alcoholic liquors* in less quantities than five gallons", in New Orleans, "without any State license for so doing." (R., p. 1.)

The plaintiffs in error (excepting that no cause of action had been averred), answered the rule against them, first, by a general denial; second, by admitting and averring that they were engaged in business in the City of New York as importers of wines and liquors for sale, and had made some sales thereof in New Orleans, and further averring as follows:

"3rd. And further answering they aver that all wines and liquors sold by them were of foreign production and were by them imported from foreign countries into the United States, under the law sthereof; that they were all subject to duty under said laws upon their importation; that they paid such duties and thereby acquired the right to sell the goods imported, which right to sell could not be taxed by the State of Louisiana in the form of a license or otherwise, or in any way impaired; that all such goods were sold in the original packages in which imported, and they are in no way liable to the taxes sought to be recovered in this case." (R., p. 3.)

They also filed an amended answer averring as follows, viz:

"That the imposition of a license, or any tax by the State of Louisiana upon the sale of their importations of wines and liquors would be in violation of the Constitution of the United States, Article 1, Section 10, which declares that 'No State shall, without the consent of the Congress, lay any im-

posts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' and that the taxes sued for are sought to be imposed under the laws of the State of Louisiana upon these defendants upon the sale of their imported wines and liquors contrary to the prohibition of said provisions of the Constitution of the United States." ( R., p. 5.)

The case was tried upon an agreed statement of facts. ( R., p. 4.)

The demand of the State was rejected by the Court of first instance, and an appeal was taken by the State to the Supreme Court of Louisiana. (R., p. 6.)

In that Court the claim for license taxes prior to the year 1909 was abandoned, and asserted only for the years 1909 and 1910. The Supreme Court reversed the judgment of the lower Court, and rendered judgment in favor of the State, for the license taxes claimed for said years with interest, attorneys' fees and costs. (R., p. 9.) And the plaintiffs in error, after their petition for rehearing was refused, sued out this writ of error. (R., pp. 16, 21), and made the following

## ASSIGNMENT OF ERRORS.

1. It appears from the agreed statement of facts upon which the final judgment in said cause was rendered, that during all the time mentioned in the rule taken by the State of Louisiana against plaintiffs in error for the recovery of the license taxes sued for, plaintiffs in error were engaged in the City of New York in the business of importing into the United States, for sale, wines and liquors of foreign production, subject to custom import dues which were paid; that a part of such wines and liquors were imported into the port of New York, where the same were stored by them in warehouse until sold, but that some were imported at the port

of New Orleans and there stored by them in the Standard Warehouse, and some of those imported at New York were sent from there by them and stored in the same warehouse; that all the said wines and liquors imported directly at New Orleans, or brought from New York, were stored by the importers in said warehouse in the original unbroken packages in which they were imported, and were sold and delivered by them or by their order to the purchasers in Louisiana in like unbroken packages; that each of said packages contained about three (3) gallons; that each sale was for two or more packages, but that deliveries were sometimes made of a single package; that plaintiffs in error were never at any time engaged in the business of conducting in the State of Louisiana a barroom, cabaret, coffee house, beer saloon, liquor exchange, drinking house, grog shop, beer house, beer garden, or other place where spiritous, vinous, malt liquor or intoxicating beverages, bitters or medicinal preparations of any kind were sold directly or indirectly, excepting the wines and liquors imported by them and sold as aforesaid, in the original and unbroken packages in which they were imported.

Under this state of facts the Supreme Court of Louisiana erred in holding and deciding that the Act of Congress of August 8, 1890, 26 Statutes, p. 313, commonly known as the Wilson Law, was and is a consent by Congress to the levy of a license tax by the State on the importers for the privilege of selling their imported wines and liquors in the State of Louisiana, within the intent and meaning of Article 1, Section 10, of the Constitution of the United States, which justified the denial by the Court of the exemption under said article pleaded by plaintiffs in error as a defense, and in rendering the final judgment against plaintiffs in error for the amount of said license.

2. The Court erred in denying the right claimed by plaintiffs in error to sell the wines and liquors imported by them

from foreign countries without payment of the license taxes sought to be imposed upon such sales by the law of the State of Louisiana in violation of Article 1, Section 10, of the Constitution of the United States.

3. The Court erred in holding and decreeing the liability of plaintiffs in error to a tax upon their sales because some of their wines and liquors were imported into the State of New York and thence sent to New Orleans for sale in their original and unbroken packages by plaintiffs in error, as if the right of sale, free from State taxation, depended upon the place of sale instead of the fact of their importation.

4. The Court erred in holding and decreeing that the Act of Congress approved August 8, 1890, known as the Wilson Act, gave the State the right to impose upon plaintiffs in error the taxes herein sued for. ~~(R., p. 17.)~~

5. The Court erred in holding and decreeing that plaintiffs in error had made any sale of wines or liquors in quantities less than five gallons as untruly alleged in the rule of the State herein, the truth, and the facts agreed upon being that all sales made by plaintiffs in error were made in original packages as imported; that a case of wine of their importation contained about three gallons, and that their sales were made in quantities of several cases, although single cases were sometimes delivered.

6. The Court erred in holding and decreeing that plaintiffs in error were in 1909 and 1910 engaged in the business of conducting in the State of Louisiana a barroom or like place where spirituous, vinous, or other liquors were sold, within the meaning of the statutes of Louisiana, Act. No. 176 of 1908.

7. The Court erred in not holding that importers have the right to sell the goods imported by them in the original and

unbroken packages in which same were imported, in any market of the United States and are entitled to the same protection granted by Article 1, Section 10 of the Constitution of the United States as to sales made at the original port of entry.

8. The Court erred in holding that the license tax claimed by the State of Louisiana under Act 176 of the Legislature of Louisiana, approved July 8, 1908, was levied pursuant to the police powers of the State and that Congress had assented thereto by the Wilson Law of August 8, 1890. (R., p. 19.)

## ARGUMENT.

The pertinent agreed facts are, that all the wines and liquors sold by the plaintiffs in error were imported by them from foreign countries, under the laws of the United States; were subject to duties under said laws upon their importation, and that all such duties were paid by them.

They assert that the imposition of a license, or any tax by the State of Louisiana upon the sale of their importations of wines and liquors would be in violation of the Constitution of the United States, Article 1, Section 10, which declares that "No state shall, without the consent of the Congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws."

They assert that, because of the facts aforesaid, and of such provision of the Constitution, they acquired the right to sell the goods imported, which right to sell could not be taxed by the State, in the form of a license or otherwise, or in any way impaired.

This right was declared by this Court as long ago as 1827, in *Brown vs. Maryland*, 12 Wheat. 419, which has been followed from that day to this in every case where the question arose; the more notable decisions being *May vs. New Orleans*, 178 U. S. 496-507; *Norfolk & Western Ry. Co. vs. Sims*, 191

U. S. 441, and *American Steel & Wire Co. vs. Speed*, 192 U. S. 500-519.

In the last case cited this Court said:

> "Since *Brown vs. Maryland*, 12 Wheat. 419, it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported, or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports.'"

The claim of the State is predicated upon an act of the Legislature of Louisiana, No. 176, approved July 3, 1908 (Acts of 1908, p. 236).

Only a portion of the first section of the act has any bearing on this case, that portion being as follows, viz.:

> "Section 1. Be it enacted by the General Assembly of the State of Louisiana, that hereafter for every business of conducting a barroom, cabaret, coffee house, cafe, beer saloon, liquor exchange, drinking saloon, grog shop, beer house, beer garden or other place where spirituous, vinous or malt liquors, or intoxicating beverages, bitters or medicinal preparations of any kinds are sold, directly or indirectly, in quantities of less than five gallons, the license shall be based on the annual gross receipts of said business as follows, to-wit:
>
> * * * * * * * *
>
> "Seventh Class: When said gross annual receipts are less than $5,000, the license shall be $200."

It is agreed that the goods of plaintiffs in error were stored in warehouse, and delivered therefrom in original unbroken packages when sold; that they made no sales except as above agreed, and that they were not at any time engaged in the business of

conducting a barroom or other like place for the sale of liquors of any kind.

They are not charged with having been engaged in the conduct of any such business, and, therefore, the provisions of Act No. 176 of 1908 could have no application, even if they were not importers.

It was contended by the State in the Court below, and doubtless will be here, that the "Act of Congress approved August 8, 1890 (26 Stat., 313), known as the 'Wilson Act,'" applies as well to imported wines and liquors as to interstate shipments.

It was admitted by the State there is no decision to that effect. In the very nature of things there cannot, and never will be, while the Government exists, any decision recognizing the authority of a State to tax its sources of revenue, directly or indirectly. By far its largest revenue is derived from duties upon imports, the annual amount thereof being hundreds of millions of dollars, the amount derived from duties upon wines and liquors being a large proportion thereof, amounting to $17,215,016 in the fiscal year ending June 30, 1911. Concede the right of the States to interfere with the collection of its revenues and a more effectual way of destroying the Government cannot be imagined.

If this Court were to sustain the claim of the State because of the provisions of the "Wilson Act" and adjudge the plaintiffs in error liable to the license taxes claimed, it would affirm its right to interfere with the execution of the most vital powers of the United States.

The "Wilson Act," as is well known, was passed to obviate the effect of the decision of the Supreme Court in *Leisy vs. Hardin*, 135 U. S. 100, where it was held that the law of Iowa prohibiting the receipt and sale of liquors shipped into that

State from the State of Illinois was void as an interference with interstate commerce. The purpose of the act was to permit the States to give effect to such legislation, so far as interstate commerce was concerned, by removing the bar in such cases of that provision of the Constitution which gives to Congress the exclusive regulation of such commerce. It in no way interfered with the revenues of the United States.

We do not deny the power to pass such an act, but we do deny that the act applies to importations from foreign countries.

Louisiana is not a prohibition State. The right to sell intoxicating liquors is recognized by law.

The only limitation (except where local option prevails, which does not in New Orleans) is upon the right to sell at retail, *without a license*.

The right of the importer to sell his importations in the original unbroken package cannot be affected by State legislation.

The Constitution, Article 1, Section 10, provides that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

We deny that the laws in question or any law of the State provides or intends to provide for the inspection of any goods imported.

The "Wilson Act" must be read with a view to the purpose of its enactment.

It will not be presumed that Congress intended its provisions to be construed to extend to importations from foreign

countries, and thereby cripple the revenues of the Government.

In *Delamater vs. South Dakota*, 205 U. S., 93-98, this Court, considering the effect of the "Wilson Act," said:

> "It is settled by a line of decisions of this Court, noted in the margin, that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the States, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the States over intoxicating liquor, by the 'Wilson Act' adopted a special rule enabling the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

The exclusive right of Congress to regulate commerce, both foreign and domestic, was affirmed, and the operation of the "Wilson Act" confined to liquors, the subject of interstate commerce.

This exclusive right of Congress has been strenuously upheld in a long line of decisions. The "Wilson Act" is believed to be the first relinquishment of its absolute control, and the permission given the States to participate in such regulation must be limited to the letter of the law. Its extension beyond that cannot be implied.

It should be noted here that under the "Wilson Act" it is only the *liquors* described, that become subject to the laws of the States upon their arrival therein, and that there is no law in Louisiana prohibiting or in any way restricting the importation of liquors, nor is there any tax imposed upon liquors, as such, upon their arrival in the State or afterwards.

The authority given to the States by the act is confined to liquors *"transported"* into any State or Territory. The language is guarded and evidently intended to prevent its application to imported liquors.

The words "imported" and "importation" each have a distinct and well settled meaning in law, "importation" being defined as "the act of bringing goods and merchandise into the United States from a foreign country;" and "an imported article is one brought or carried into the country from abroad."

Bouviers Law Dict. Rawles Ed., verbo Imported, Importation.

In *American Steel and Wire Co. vs. Speed*, 192 U. S. 500-520, this Court, following *Brown vs. Maryland*, and *Woodruff vs. Parham, Supra*, defined imports as follows:

> "Imports in the constitutional sense embraces (only) goods brought from a foreign country."

It must be presumed that Congress well knew the meaning of these words, and carefully limited the license given to the States over liquors transported from one State to another and intended to exclude its application to imported liquors.

The claim of the State that, because some of the defendants' importations were made through the Port of New York, and thence shipped to New Orleans, they became the subject of interstate commerce and therefore subject to the provisions of the "Wilson Act," is untenable.

The right to sell the imported article is not limited to the place of importation. The importer may sell the same when and where he pleases without becoming liable to any State or municipal tax.

In *State ex rel Gelpi vs. Assessors*, 46 Ann. 145, the Supreme Court of Louisiana, following *Brown vs. Maryland*, held that the right to import carries with it the right to sell;

and that the immunity from the payment of taxes follows the goods, without reference to the place where they are stored.

Any other rule would deprive the importer who did not reside and do business at the seaboard, within a port of entry, of the protection of the constitutional provision under consideration.

The only limitation upon his right to sell without payment of such tax is, that he must sell in unbroken packages as imported, which is the fact here.

The defendants were not engaged in the "business of conducting a barroom" or other like place for the sale of intoxicating liquors, and the only sales made by them were of goods in the original unbroken packages in which they were imported. A case of wine of their importation contains about three gallons, and their sales thereof were in quantities of *several cases*. If their sales were of only two cases at a time, the quantity sold was more than five gallons, and therefore they are not liable to the tax.

The Court below seized upon the fact that a single case, of several sold, was sometimes delivered, and sought to legislate into the act the word *delivered* in place of the word *sold*. Was this with the hope to evade the protection of the Constitution pleaded by the defendant? If so, it cannot prevail.

That Court failed to see that it is not a sale, or delivery, of less than five gallons of alcoholic or other liquors that subjects one to the tax; but it is the *business of conducting* a *barroom*, or other like place where such sales are made, that creates the liability.

There is nothing in the argument of the Court below contained in its opinion which requires any answer other than that made above.

The facts and the law being in favor of the plaintiffs in error, the judgment of the Supreme Court of Louisiana should be reversed, and said Court should be directed to affirm the judgment of the Civil District Court in favor of the defendants below, plaintiffs in error here, with all costs.

New Orleans, Dec., 1912.

Respectfully submitted,

J. D. ROUSE,
WILLIAM GRANT,
WILLIAM B. GRANT,
Attorneys for Plaintiff in Error.

# Supreme Court of the United States

OCTOBER TERM, 1912.

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## No. 696.

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FREDERICK DeBARRY COMPANY,
PLAINTIFFS IN ERROR,

VERSUS

THE STATE OF LOUISIANA,
DEFENDANT IN ERROR.

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ON ERROR TO THE SUPREME COURT OF LOUISIANA.

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BRIEF FOR THE DEFENDANT IN ERROR.

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### STATEMENT OF THE CASE.

The Legislature of the State of Louisiana, under Article 229 of its Constitution of 1898, is empowered to levy a graduated license tax upon all trades, businesses and callings, and, under Act 171 of the Session of 1898, the Legis-

lature levies a graduated license or business tax upon all trades, businesses and callings.

In 1908 the sale and use of intoxicating liquors in the State of Louisiana had reached a parlous condition, and the outgoing Governor, in his Message to the General Assembly, and the incoming Governor, in his Message to the same body, called attention to the conditions, and suggested that police legislation on the subject be passed.

Under Article 181 of the Constitution of 1898 the regulation of the sale of intoxicants is declared a police regulation and the Legislature is empowered to enact laws to regulate their sale and use.

The General Assemby of the State of Louisiana, at the Session of 1908, passed Act 176, commonly known as the "Gay-Shattuck Bill." It took the liquor business out of Act 171 of 1898, which levies a business tax upon all other businesses, and made it subject to the exclusive regulations and licensing of this Act 176 of 1908.

The "Gay-Shattuck Bill" has as its main object the police regulation of the liquor traffic, and, as an incident thereto, the levying of a license tax upon intoxicants.

In 1910, the State Tax Collector for the City of New Orleans, becoming aware of the facts concerning Frederick DeBarry Company, Plaintiffs in Error herein, set forth in the agreed statement of facts in the record, proceeded by summary process to compel Plaintiffs in Error to submit themselves to the regulation of the "Gay-Shattuck Bill," and endeavored to enforce the collection of a license tax upon Plaintiffs in Error as a retailer of liquors—*i. e.*, for disposing of liquors in less quantities than five gallons, during the years 1910, 1909, 1908 and 1907.

The "Gay-Shattuck Bill," having become effective only

January 1, 1909, the State, in the Supreme Court of Louisiana, abandoned its claim for license for the years 1908 and 1907, because it is conceded that Act 171 of 1908 is purely a revenue measure, and Plaintiffs in Error are only subject to the payment of a license tax as an incident to police regulation.

The claim for license for 1909 and 1910 is made under the proviso of Section 1 of Act 176 of 1908, at page 236 of the Acts of the Legislature of the State of Louisiana of that year, as follows:

> "* * * Provided, further, that no establishment selling or giving away or otherwise disposing of spirits, wines, or alcoholic or malt liquors in less quantities than five gallons, shall pay a license of less than $200; provided, further, that, for the business of selling malt and vinous liquors exclusively in quantities of less than five gallons, the license shall be one-half of that above provided for the general sale of alcoholic beverages." * * *

In Vol. 130, Louisiana Reports, at page 1091, *State vs. Frederick DeBarry & Co.*, the Supreme Court of Louisiana found as follows:

> "* * * There is no dispute as to the facts. The defendant company sells foreign wines and liquors from a warehouse in New Orleans in the unbroken package. The package contains three gallons. No sale has been of less than several of these packages; but deliveries of a single package have been made. Some of the goods are imported direct to New Orleans; others go to New York, and are there stored in the Standard Warehouse, and thence transmitted to New Orleans. Whether the goods thus transmitted are originally destined to New Orleans and stop in New

York merely in transitu, or are taken for transmission indiscriminately from the stock of goods in the New York warehouse, and how long they remain in New York, or for what reason they go first to New York and not directly to New Orleans, is not shown by the record. All the goods have paid import duties. The defendant company carried on this business in 1909 and 1910, but not in 1907 and 1908. Its gross annual receipts from said business did not exceed $3,000 per annum. *It has paid internal revenue license for those years*, both as a wholesale and retail dealer, but has paid no license to the State.

"(1) Defendants contends that said statute (Act 176 of 1898) has no application to a business such as that which defendant carries on, but only to the business of conducting a barroom or other like place.

"This question was fully considered, and determined adversely to defendant's present contention, in *State vs. Pabst Brewing Co.*, 128 La. 770 (55 South. 349), where it was held that a Milwaukee brewery, which sent its beer to New Orleans and there sold it from a warehouse in the unbroken package, was amenable to the provisions of said act.

"(2) Another reason assigned by defendant why said license is not due is that the sales made in said business have been in greater quantities than five gallons, though some of the deliveries under the sales have been in less quantities.

"This contention is but slightly touched upon in the brief—evidently because defendant can have but little faith in it. It is manifestly without merit. When said statute speaks of a place where liquors are sold in quantities of less than five gallons, it evidenty does not mean the place where the contract of sale is entered into, but where the delivery is made. Such a law as this concerns itself little with the contract, apart from the delivery; it is the delivery that is the

thing. It is that which must be in less quantity than five gallons.

"(3, 4) Another contention is that said statute, if applicable to defendant's business, is null, as interfering with interstate commerce.

"That point, too, was disposed of in said case of *State vs. Pabst Brewing Co.*

"But defendant contends that said decision, even if correct, cannot control the present case, for the reason that it is based on the Wilson Act (Act of Congress, August 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]); and that said act has reference only to liquors 'transported' into a State, and not to liquors 'imported' into a State; and that all liquors sold by defendant were imported. In support of that contention, defendant argues that the word 'imported' has a well-defined legal meaning, and is 'the act of bringing goods and merchandise into the United States from a foreign country' (Bouvier Law Dict. [Rawle's Ed.], *verbis* Imported, Importation); that this meaning is not conveyed by the word 'transported,' made use of in the Wilson Act; that Congress well knew the difference in meaning between the two words, and used the word 'transported' advisedly, and would never have consented to allow the States to tax imports of liquors, enabling them, by heavy taxes, to shut out imports, and thereby deprive the Government of an important source of revenue; and that the Supreme Court of the United States, in the case of *Delamater vs. South Dakota*, 205 U. S. 93-98 (27 Sup. Ct. 447; 51 L. Ed. 724; 10 Ann. Cas. 733), recognized this contention when it said that:

"'The Wilson Act adopted a special rule enabling the States to extend their authority to such liquors shipped from other States.'

"There is absolutely nothing to show that the Court meant here to intimate that liquors brought from a foreign country would not come under the Wilson Act.

As to what Congress would have consented, or not consented, to do, none can say; and, if we come to conjecturing, it is hardly to be supposed that Congress would adopt such a halfway, futile, and useless measure as to allow the States to protect themselves against liquors coming from other States, while denying them the same right as to liquors coming from foreign countries—would, for instance, allow protection to Texas against liquors coming from Louisiana and Oklahoma, but none against liquors from Mexico. Congress is not addicted to making Dead Sea apple gifts, or to discriminating thus rankly against native producers of any article of commerce, in favor of foreign producers.

"Moreover, the Wilson Act uses, also, the term 'introduced therein'; and, most unquestionably, the goods in question were 'introduced' into this State.

"Clearly, this argument sought to be based upon the difference in meaning between the words 'imported' and 'transported' is without merit.

"(5) Defendant contends that the Wilson Act, if construed to authorize the States to impose taxes upon imports, becomes obnoxious to Article 1, par. 10, of the Constitution of the United States, that:

" 'No State shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"Suffice it to say, in answer to this, that this constitutional provision has reference only to such State taxes as may be attempted to be laid upon imports without the consent of Congress, and has no reference to State taxes laid with the consent of Congress.

"(6) However, if the interpretation of the Wilson Act contended for by defendant were accepted, the license in question would still be due; since a part of the goods sold by defendant were not imported direct,

but were transmitted to Louisiana from the stock of goods stored in the warehouse in New York, and forming part of the general mass of property in the State of New York. Nothing in the record shows that these goods were warehoused in New York while in transit, and not after they have terminated their importation voyage. In other words, that they were shipped direct to New Orleans, via New York, and not simply to New York. No reason is assigned and no suggestion made why these goods should have been stopped and warehoused in New York if originally destined to New Orleans. So far as the evidence shows, therefore, the goods were merely 'transported' from New York to this State. But even where goods are intended for transmission and are stored merely temporarily, they become a part of the general mass of property of the State where stored. *Brown vs. Houston*, 114 U. S. 622 (5 Sup. Ct. 1091; 29 L. Ed. 257); *Merchants' Transfer Co. vs. Board of Reviews*, 128 Iowa, 732 (105 N. W. 211; 2 L. R. A. [N. S.] 662; 5 Ann. Cas. 1016, and cases cited in note). Also, *Lehigh Coal Co. vs. Borough*, 75 N. J. Law, 922 (68 Atl. 806; 15 L. R. A. [N. S.] 514). So that, even if said goods were originally intended for New Orleans, and were stored in New York only temporarily, their transmission to New Orleans was a 'transportation,' and not an 'importation,' into Louisiana, according to the meaning attributed to these two words by defendant."

All findings of the Supreme Court of Louisiana, of fact and law, with one exception, are final under the decision of this Court, that, in matters of interpretation of purely local statutes, no Federal question being involved, the decision of the Supreme Court of a State will be taken as final.

*American Sugar Refg. Co. vs. Louisiana*, Vol. 179 U. S. 91.

Leaving solely for consideration of this Court the question, under the facts agreed herein, is the imposition of a license tax upon the Plaintiffs in Error herein, only in as far as it imports and sells in less quantities than five gallons, the levy of a tax by the State of Louisiana upon imported goods before the process of importation has come to an end? The State does not, and it is conceded that it could not, levy a license on Plaintiff in Error if plaintiff ceased doing business as a retailer—*i. e.*, importing and selling in less quantities than five gallons.

ARGUMENT.

It is clear that Frederick DeBarry Company bring wine into the State of Louisiana from France in original packages, of less than five gallons, and dispose of these original packages, unbroken, either to the consumer or to those who resell them in a broken condition. Under the general rule of law, as founded by the Federal Constitution and as laid down by the Supreme Court of the United States in *Brown vs. Maryland*, 12 Wheaton, 419, the goods imported from a foreign country, or from another State, are not subject to the taxation of a State into which they are imported until the packages have been broken or the importer has sold them, and, therefore, DeBarry Company would not be the subject to any State taxation if it sold non-intoxicants. It is asserted that intoxicants, and intoxicants alone, in small quantities, are subject to State regulation.

In the case of *Pearce vs. New Hampshire*, 5 How. 504, known as the "License Case," Chief Justice Taney decided that where liquors were transported from state to state, they were subject to the license of the state into which they were imported, because the police powers of the

states were paramount to the interstate commerce clause of the Federal Constitution. It came to be the settled doctrine that intoxicants, transported from one state to another, were subject to the laws of the latter state, relative to their sale or disposition, to the same extent as any other intoxicating liquor already in the State, and could not be sold, either in the original package or other form, except as the laws of the state prescribed, and that the police power of a state, so exercised, did not infringe upon the power delegated to Congress to regulate interstate commerce.

In 1888, the United States Supreme Court, in *Borman vs. Chicago,* intimated that the license cases were badly bottomed.

In 1890, the Supreme Court of the United States decided the famous original package case, *Liesy vs. Hardin,* 135 U. S. 100. It was there held that a statute of Iowa, levying a license upon imported beer, was unconstitutional in as far as it prohibited the sale of liquors by a foreign or non-resident importer in the packages in which they were brought from another state, because in conflict with the provision of the Federal Constitution which vests in Congress the power to regulate commerce among the states.

This case overruled the licenses cases, four judges dissenting. It was strongly hinted by the Supreme Court that relief might be had in the halls of Congress, and Congress enacted what is commonly known as the Wilson law, within four months of this decision, on August 8, 1890, which is as follows:

> "That all fermented, distilled or other intoxicating liquors or liquids, transported into any state or ter-

ritory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This act was declared constitutional, In re Rahrer, 140 U. S. 545.

In Vol. 128 La Rep., page 770, *State vs. Pabst Brewing Company*, the Supreme Court of Louisiana held the Pabst Brewing Company subject to the provisions of Act 176 of 1908, the Pabst Company shipping beer in quantities of less than five gallons from Milwaukee into the state of Louisiana, and disposing of it in unbroken packages, the Pabst Brewing Company setting up the defense that the transaction was one of interstate commerce, the Supreme Court of Louisiana properly holding, however, that under the Wilson law the petty traffic in intoxicants can be regulated and taxed due to the Wilson Bill.

The only question for the Court to herein decide is, whether the provisions of the Wilson Bill apply as well to an international shipment as to an interstate shipment? The only difference between the contention of the plaintiffs in error and the contention of the defendants in the Rahrer case, and in other similar cases decided by the Federal Courts, is that in those cases the defense was based upon the inefficiency of the Wilson law due to Article 1, Section 8, Paragraph 3 of the Constitution of the United States, which is as follows: "Congress shall have power to regulate commerce with foreign nations and among

the several states and with the Indian tribes." This is under the Section, "Powers granted to Congress." The plaintiffs in error base their contention upon Article 1, Section 10, Paragraph 2, of the same Constitution: "No state shall, without the consent of Congress, lay any imposts as duties on imports or exports," etc.

There is no case, state or federal, that we have been able to find, which decides the question whether the Wilson law applies exclusively to shipments of liquor from other states, or applies also to shipments of liquor from foreign countries. The Court, therefore, can be guided by the reasons of the law, its history, and the Court's own common sense in determining the extent of its application. It is to be noted that the Wilson Bill is so drawn that it does not state "liquors transported into any state from another state," but is so drawn that it applies to "liquors transported into any state from any place." It is also to be noted that the Supreme Court of the United States in the Rahrer case, has decided that Congress has the power to fix the time at which the interstate shipment shall cease to be an interstate shipment and there is no reason or authority why it has not equally the power to fix the time when a foreign shipment or import shall be subject to the state laws. It is also to be noted that the Wilson law was passed in 1890, when the liquor interests, under the shield of the Federal Constitution, were technically obeying, but morally violating, the home laws of the prohibition states, and that the object of the Wilson Bill was to protect these states and such other states as desired to regulate the liquor traffic, in the enforcement of their home laws. Such protection, in order to be accorded by Congress, must not only extend to interstate shipments,

but must also extend to foreign shipments, and so the wording of the law is such that it does so extend. In addition it is to be noted that the Rahrer case decided that the Wilson Bill was not in conflict with that article of the Constitution, which gives Congress the sole, exclusive and unalienable right to regulate commerce with foreign nations and among the several states, and, if it is not in conflict with that article, there is less reason to say that it is in conflict with the second constitutional article, above cited, that is the one denying the power of the states to levy duties on imports, because the second above cited constitutional article refers to not an exclusive and unalienable power of Congress, but to one that can by Congress be delegated to the states, under such limitations as Congress may see fit. There is more reason, therefore, to contend that the Wilson law is not in conflict with the constitutional article, secondly above cited, than that it is in conflict with the constitutional article first above cited.

The Court will find, in the case of *Heyman vs. Southern Railway Company*, 203 U. S. 270, the Supreme Court of the United States declares that the whole question, involved in "when are liquors shipped from other states subject to the state laws," depends upon the word "arrival," as used in the Wilson law; that it there determines that liquor has not "arrived" in a state until it is delivered to the consignee, and, when it is delivered to the consignee, it is then subject to state legislation passed under the police powers of the state.

Now, in the instant case, the plaintiffs in error consign its liquor to itself in New Orleans, and, under the case of *Stevens vs. Ohio*, 93 Federal Reporter, p. 793,

where the shipper is also the consignee, the liquor becomes subject to the Wilson law as soon as it is delivered to the shipper as consignee, and as the property of the consignee it immediately becomes subject to the liquor legislation of the state.

The Court will, in addition, note that the liquor of the plaintiffs in error is, to a considerable extent, shipped from France to the city of New York; and that when these shipments are so carried on and transacted, they are purely shipments between France and New York, and therefore, the import character of this liquor is lost when it reaches the warehouse in New York; that subsequently certain parts of this liquor, which did not leave France with an ultimate particular destination of New Orleans, but left France with a destination of New York, is indifferently taken from the warehouse in New York and shipped to New Orleans. Common sense and principle both compel us to contend that such liquor is part of international traffic between France and New York. After it leaves the warehouse in New York, and is shipped to New Orleans, during the latter named carriage it is purely interstate traffic, and, under such circumstances, such liquor is clearly subject to the decision of our Supreme Court in the Pabst case. 114 U. S. 622; *Brown vs. Houston,* 2 L. R. A, N. S. 662; *Merchants Co. vs. Board of Review; Pittsburg Co. vs. Bates,* 156 U. S. 577; *Kelly vs. Rhoades,* 188 U. S. 6; *Lehigh Coal Co. vs. Borough,* 15 L. R. A. (N. S.) 514.

In brief, we concede as correct all that the plaintiffs in error say concerning *Brown vs. Maryland,* as to international traffic in all goods except alcoholic, because we contend that Congress has the power and has exercised

the power of saying when international traffic shall cease, just as it had the power and exercised the power of saying when interstate traffic shall cease; that, if there is a difference between the article of the Constitution, relative to interstate traffic between the states, and the articles concerning international traffic, it lies in that Congress is given the power to permit the states to levy taxes upon international traffic and it is not given the power to permit the states to levy taxes upon interstate traffic.

It was stated by counsel for plaintiffs in error, that it would be absurd for the Federal Government to yield to the states the power to levy upon imposts, state taxes, because were the Federal Government to do so, it would thereby seriously affect the sources of its own financial support—its income from taxes from imports. Stated as a general proposition, this is true, and stated as another general proposition it is also true that, through the instrumentality of the technical protection of the Federal Constitution, the states should not have their internal policing interfered with. Both state and federal authority have to some extent to give up their theoretic rights. This has been admirably done by both powers when we consider the Wilson Bill and the Gay-Shattuck Bill. The Federal Government has not, by the Wilson Bill, given the state government plenary powers to tax imports of liquor, nor has the State of Louisiana attempted to exercise an excessive power. The Federal Government has simply given to this state the right to impose upon liquors a tax incidental to its police regulations, and the state, in the exercise of that permission, has passed reasonable legislation, whereby imported liquors are not all affected, but only the sale of imported liquors in less quantities

than five gallons. If the Federal Government had given to the state the right to tax all imports, certainly its rights would have been effected; if the state, under the power given it by the Federal Government, had taxed all liquors, that would have been a stretch of its police powers. The state has simply taxed those who dispose of liquors in less quantities than five gallons. This is a reasonable concession on the part of the Federal Government and that concession has as reasonably been exercised by the state.

We respectfully submit that all questions of local law involved in this case are conclusively decided by the Supreme Court of Louisiana; that there is no binding authority on the Federal question involved; and that all persuasive authority sustains the position of the State of Louisiana.

R. G. PLEASANT,
*Attorney General of the State of Louisiana.*

WILLIAM W. WESTERFIELD,
EDWARD RIGHTOR,
*Counsel for Defendant in Error.*

## DE BARY & COMPANY *v.* STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 696. Motion to affirm submitted January 10, 1913.—Decided January 27, 1913.

Under the Wilson Act of August 8, 1890, 26 Stat. 313, a State may impose a license for regulating the sale of liquor in original packages brought from foreign countries, as well as that brought from other States.

Where a statute refers to "all" liquors transported into a State or Territory the point of origin is immaterial and the law applies to liquors alike from other States and from foreign countries.

The intent of Congress in enacting the Wilson Act was to give the several States power to deal with all liquors coming from outside to within their respective limits, and this purpose would be defeated if the act were construed so as not to include liquors from foreign countries as well as from other States.

An act of Congress, such as the Wilson Act, will not be so construed as to confer upon foreign producers of an article a right specifically denied to domestic producers of that article.

130 Louisiana, 1000, affirmed.

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[1] See the act of Congress approved January 7, 1913, entitled "An act to provide for holding the District Court of the United States for Porto Rico during the absence from the island of the United States district judge and for the trial of cases in the event of the disqualification of or inability to act by the said judge."

THE facts, which involve the construction of the Wilson Act, are stated in the opinion.

*Mr. J. D. Rouse, Mr. William Grant* and *Mr. William B. Grant* for plaintiff in error.

*Mr. R. G. Pleasant*, Attorney General of the State of Louisiana, *Mr. William W. Westerfield* and *Mr. Edward Rightor* for defendant in error.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

De Bary & Company seek the reversal of a judgment for the amount of a license tax (Act No 176 of 1908, Session Acts of that year, p. 236) for engaging "in the business of disposing of alcoholic liquors in less quantities than five gallons." It was conceded below that the business for which the license was exacted consisted only in the sale in the original packages of foreign wine or liquor, some of which was imported through the port of New York and some through the port of New Orleans, a portion of that which was brought into the port of New York having been there stored and subsequently shipped to New Orleans. The court below held, *first*, that imposing the license was an exertion by the State not only of its revenue powers, but of its police authority brought into play for the purpose of regulating the sale of liquor. In consequence of the provisions of the act of Congress known as the Wilson Act, August 8, 1890, 26 Stat. 313, chap. 728, and the decisions of this court interpreting and applying the same, it was therefore held that the sale of imported liquor in the original packages was subject to state regulation and hence the license was valid; *second*, that even if the Wilson Act did not concern liquor imported from a foreign country, nevertheless the license was valid be-

cause some of the liquor sold had been shipped to Louisiana from the State of New York after its importation from a foreign country.

Without considering the second proposition, we think the construction given to the Wilson Act, upon which the first proposition rests, was so obviously the result of the text of that act as interpreted by the decisions of this court as to leave no room for controversy. *Pabst Brewing Company* v. *Crenshaw*, 198 U. S. 17; *American Express Company* v. *Iowa*, 196 U. S. 133; *Vance* v. *Vandercook Co., No. 1*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412; *In re Rahrer*, 140 U. S. 545. It is true that the controversies which were passed upon in the cited cases concerned not liquors imported into the United States from foreign countries, but only liquors which had been brought in from one State to another. But this fact cannot be held to distinguish this case from the previous decisions without giving effect to a distinction without a difference. To hold that liquors brought into a State from a foreign country do not become subject to the state police power until sold in the original packages would certainly conflict with the command of the statute that "all" liquors "transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory" be subject "to the operation and effect of the laws of such State or Territory as though such liquors or liquids had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The word "all" causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered if possible clearer by a consideration of the intent of Congress in enacting the Wilson Law. In reason it is certain that the purpose which led to the enactment of the law was to give the several

States power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a State from a foreign country from the operation of the statute. Indeed to adopt the construction urged would not only give rise to the contradictions which the analysis of the contentions thus make plain, but would compel us to say that Congress intended by the Wilson Law to confer upon foreign producers of liquor a right which was specifically denied to liquor of domestic production.

*Affirmed.*